United States Court of Appeals

for the Second Circuit

REPLY BRIEF

75-6081

United States Court of Appeals
FOR THE SECOND CIRCUIT

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6081

PHILIP MORRIS INCORPORATED,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6085

R. J. REYNOLDS TOBACCO COMPANY,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6088

LOEW'S THEATRES, INC.,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6087

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF-APPELLANT, AMERICAN BRANDS, INC.

(Continued on Inside Cover)

AMERICAN BRANDS, INC.,
Plaintiff-Appellant,

against

FEDERAL TRADE COMMISSION, et al.,
Defendants-Appellees.

75-6090

LIGGETT & MYERS INCORPORATED,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6089

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SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF-APPELLANT, AMERICAN BRANDS, INC.

Preliminary Statement

Plaintiff-Appellant, American Brands, Inc. (herein "American"), respectfully submits this Supplemental Reply Brief in reply to the Brief for the Defendant-Appellee [sic] filed by the United States Attorney in 75-6081 (herein sometimes referred to as the "government") and to supplement the Joint Reply Brief of Plaintiffs-Appellants filed herein.

Introduction

The government's statement of facts set forth in the Brief for Defendant-Appellee [sic] is factually incorrect and misleading in several respects and requires correction.

(a) American's Compliance Report and Subsequent Compliance.

The government's claim that American's compliance report was incomplete and that it engaged in violative advertising practices after the filing of this report (Government's brief at 5) is totally false. First, American has complied and continues to comply with the provisions of the Consent Order (American Verified Cplt. ¶ 32, App. at A114). Second, on January 31, 1972 when the Consent Orders were announced, the Federal Trade Commission (herein sometimes referred to as the "FTC") also publicly announced that it would thereafter carefully monitor compliance with the Consent Orders (American Verified Cplt. ¶ 29, App. at A113). Third, on September 12, 1972, American submitted a Report of Compliance to the FTC which included as exhibits samples of all of the cigarette advertising prepared by American which had been delivered in

final form to the printer, publisher or production house. These samples contained the warning statement as required by the Consent Order (American Verified Cplt. ¶ 34, App. at A114 and Exhibit D to American Verified Cplt., Report of Compliance, A159). Fourth, the exhibits included in American's compliance report represented all manner and form of American's advertising which has continued unchanged in manner and form to the present (A504, A506).* Fifth, by letter dated December 20, 1972, the FTC accepted American's compliance report (A160). Sixth, by reports dated December 31, 1972 and December 31, 1973, the FTC publicly and officially reported to Congress that American's advertisements were in compliance with the terms of the Consent Order (American Verified Cplt. ¶¶ 36, 37, App. at A114-115). Seventh, the FTC never officially notified American of any claimed violative practices until its letter of August 1, 1975. Eighth, the FTC never advised American of any claimed fault with its compliance report until the affidavit of Eric M. Rubin was filed below August 25, 1975. Surely if American's compliance reports were so incomplete and its advertising so violative of the Consent Order, the FTC would not have waited three years to notify American, particularly when the FTC represented to Congress and hence to American that it was carefully monitoring compliance.

(b) The FTC Assertion That Its August 1, 1975 Determination Was an Invitation to Negotiate.

The government's continuing factual assertion that the August 1, 1975 official determination by the Commission was merely to give American the opportunity to come for-

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* Because the government has raised the issue of the merits (Government's brief at 20), which was not considered below, and because the government has now raised its motion to dismiss (*Id.* at 3, 21-2), which is now pending in the district court, the objection by the government at page 20 of its brief to the "Counter Affidavits" is without merit.

ward with a reasonable settlement offer is incredible, totally misleading and contrary to the plain language of the letter (Government's brief at 6, A274-275). The Rubin affidavit (A217-28), upon which this facetious assertion is based, is the misleading statement of a staff member and not the official position of the Federal Trade Commission. On September 5, 1975, American wrote to the Chairman of the Federal Trade Commission seeking clarification from the Chairman as to the purpose of the August 1, 1975 letter. Contrary to the representations made to the court below, the Commission's response to American's letter states that the purpose of the letter was to inform American that it had violated the Order and that the Commission would notify the Attorney General that it intends to file complaints seeking monetary penalties and other appropriate relief. (These letters are reproduced at Addendum A to this brief.) Such action was in fact filed on October 17, 1975.*

(c) The FTC Has Failed to Specify the Alleged Violations.

The government's contention that the FTC Staff detailed in "attendant settlement negotiations" the advertising practices and delineated the particular advertisements of American which they regarded as being in violation of the Consent Order, is equally incorrect and misleading (Government's brief at 5). In fact, there were never any "attendant settlement negotiations" insofar as American was concerned. Rather, the FTC Staff, during the course of the investigation, demanded from American monies of upwards of $1,000,000 as penalties, or "a substantial amount that would hurt" and refused to advance definitive past violations by American of the Consent Order and refused even to discuss any way in which American might avoid the alleged violations in future advertising (A117, A289-

* The complaint is reproduced at Addendum B.

290, A306-09, A499-500). American refused to be blackmailed into such "settlement" negotiations. Significantly, neither the August 1, 1975 letter, discussed below, nor the complaint specify the alleged violations.

(d) This Action Is Not for the Purpose of Delay.

Contrary to the government's other contention that this action represents a frivolous attempt to delay the resolution of this controversy (Government's brief at 23), the facts clearly show that it is the FTC which has dragged its feet in this matter and has impeded its prompt resolution.* The FTC investigation into American's compliance with the Consent Order was initiated "[i]n the summer and fall 1973" and on May 10, 1974 American was notified of the investigation (A161, A224-225). American thereafter submitted over 1,200 documents, and made available for interview by the FTC Staff six employees of advertising agencies employed by American, as well as five employees of American (A116). It was not until ten months later that the Staff finally made a recommendation to the Commission (A309). Four months later, by letter dated August 1, 1975, the FTC officially notified American that it had determined that it had violated the Consent Order (A164-66). The letter, however, did not identify the advertisements of American which the Commission determined were in violation of the Order, nor did it specify the ways in which American's advertising was violative or how it could be corrected, leaving American in an untenable position of not knowing what to do (A505-06).** Such vagueness, consider-

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* The plaintiffs, in oral argument, requested an expedited trial of this matter (A256, A265-66, A287). Significantly, the United States Attorney sought to discourage Judge Tenney from entertaining the application by interjecting the bogus claim that such a trial would involve "millions" of documents (A272).

** Additionally the FTC sought to charge American under the Order for violations of foreign language warnings (A165), despite

(*footnote continued on following page*)

ing the lengthy and detailed investigation which had preceded the letter and compared to the specificity embodied in the Consent Order itself, does not comport with the scheme of the Federal Trade Commission Act or with the purpose of 15 U.S.C. § 45(l), which is to secure compliance with a valid order.

Additionally, although the FTC said in the August 1, 1975 letter that it would notify the Attorney General of its intention to commence an action for civil penalties and other relief, it did not do so until August 29, 1975 and an enforcement action was not filed until October 17, 1975, after the expiration of the 45 day limit provided for in 15 U.S.C. § 56(a)(1)(B).

The facts, then, clearly show the hollowness of the government's contention that this action was initiated by American for the purposes of delay. Rather, American, faced with the risk of enormous penalties accruing day to day,* sought the prompt judicial review of the FTC's determinations to which it is entitled and a stay of penalties, without which any judicial review would be merely nominal and illusory.**

(*footnote continued from preceding page*)

the fact that the Order requires the warning to be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969, to wit, in English (A147) and sought to bring vending machines within the terms of the Order (A164) despite the fact that nowhere in the Order itself are vending machines mentioned.

* The risk of enormous penalties is no longer open to question. The government has now contended that penalties began to accrue, not on August 1, 1975, the date of the FTC's determinations, but rather on the date of each alleged violation (Government's brief at 8). Additionally, the government is claiming, in the enforcement action, that each copy of each advertisement is a separate violation (¶ 11 of the complaint) and the complaint appears to seek continuing penalties.

** As is indicated in the Appendix, American believes the foregoing facts are reflective of the situation as to each of the other companies as well.

POINT I

American Is Entitled To A Stay Of Penalties.

A party to an FTC consent order need not litigate or wait to litigate with the Sword of Damocles over his head. See *Rettinger* v. *FTC,* 392 F.2d 454, 457 (2d Cir. 1968). The government would argue that American has no such sword hanging over it for § 45 protects American from "ruinous judgments" by limiting accumulation of penalties to American's ability to pay without inhibiting Amercan's ability to continue in business (Government's brief at 16). This attempt to minimize or belittle the chilling effects of § 45 penalties is totally unrealistic. The threat is enormous. See ¶ 11 of complaint of United States of America at Addendum B.

The government further asserts that American's right to unfettered judicial review consists only of the opportunity to contest the initial validity of the Consent Order and that, having refrained from doing so at the inception of the Order, American has "waived" any right to challenge, without the threat of accumulating penalties, any subsequent FTC interpretation of that Order (Government's brief at 10). The government's position is contrary to this Court's opinion in *Rettinger* v. *FTC, supra.*

Such an argument also ignores the unique nature of consent orders. Consent orders are the result of negotiations, which inevitably involve compromises by both sides. The fact that a party waives his right to litigate the matter, thus sparing both himself and the government the time and expense of litigation, makes it all the more important that he be given the opportunity to have "the instrument construed as it is written" and not as the FTC would wish it had been. As the Supreme Court has recently stated in *United States* v. *Armour & Co.,* 402 U.S. 673, 682 (1971):

> "Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation."

The government's approach would render respondents under consent orders subject to whatever interpretation of such orders the FTC posited—regardless of how outlandish or unjust—with no effective remedy but to await an enforcement proceeding initiated at the convenience of the government. Due process and prior Supreme Court decisions set forth in Plaintiffs-Appellants' Joint Appeal Brief prohibit such a result.

The government's attempt to distinguish the *Wadley* line of decisions (*Wadley Southern Ry. Co.* v. *Georgia,* 235 U.S. 651 (1915)) is misplaced. The government ignores the fact that the FTC's August 1, 1975 determination was an independent administrative action, subject to the protection of the *Wadley* line of decisions, separate from the earlier administrative action of the entering of the Consent Order. The telling point in this case, as in the *Wadley* line of decisions, is that an administrative body has made a determination vitally affecting American and unless a stay of penalties is granted *pendente lite* American will be unable to assert its reasonably-based objections and obtain judicial review of that determination without the threat of potentially staggering penalties. American submits that the FTC's August 1 letter interpreting the prior Consent Order, and officially determining American's previous acceptable advertising practices to now be violative of the Consent Order, is in substance no different from the order of the administrative agency in *Wadley* declaring that the railway was in

violation of the pre-existing statute, thereby similarly subjecting the railway to cumulative penalties.

In its attempt to distinguish controlling Supreme Court authority, the government cites only two cases, *Floersheim* v. *Weinberger*, 346 F. Supp. 950 (D.D.C. 1972), *rev'd & remanded sub nom., Floersheim* v. *Engman*, 494 F.2d 949 (D.C. Cir. 1973), and *United States* v. *Beatrice Foods Co.*, 322 F. Supp. 139 (D. Minn. 1971). Both the *Beatrice* and *Floersheim* cases involved suits concerning compliance under litigated cease and desist orders, the validity of which had earlier been determined by courts of appeals. Here we are not involved with an order which is "established" in the sense that the interpretation of its terms has been defined and settled by judicial resolution. Rather, the Consent Order is yet to be judicially tested, and any interpretation by the FTC must be subject to American's right to make good faith objections, which right would be meaningless absent protection from the threat of accumulating penalties. Further, American can only reiterate the critical distinction, absent in *Beatrice* and *Floersheim*, that American is presently subjected to the risk of accumulating substantial penalties far in excess of the $100 per day penalties in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), during the course of this review proceeding.

Thus, it is clear that neither the *Beatrice* nor *Floersheim* decision provides support for the government's contention that the *Wadley* line of decisions are distinguishable from this case. Given the applicability of the *Wadley* line of decisions, the futility of the government's reliance upon the mandatory-discretionary penalty dichotomy is apparent.

POINT II

The Government's Public Interest Argument Is Specious At Best And Inconsistent With The Actions Of The FTC.

(a) The Public Interest Argument Is a Red Herring.

The government would argue the specter of "public interest" to defeat plaintiff's right to a stay. It claims as "several real points of public interest" (Government's brief at 23) that American is attempting to circumvent 15 U.S.C. § 45, destroy the integrity and credibility of the deterrent system embodied in § 45 and delay enforcement of the Consent Order. It should first be noted that if there is any "public interest" properly considered here, it is that of the public receiving the warning concerning cigarette smoking and not some heretofore unenunciated interest in the "integrity" of § 45. Second, American, of course, does not seek to undermine the Federal Trade Commission Act, but is merely asserting its constitutional and statutory rights, its "private interest." American entered into an agreement containing a Consent Order with the FTC in January, 1972. The Consent Order was formally issued on March 30, 1972. On September 12, 1972 American submitted a Report of Compliance containing samples of its then current advertisements. In December, 1972 the FTC accepted the compliance report as filed. Thereafter the FTC twice reported to the Congress that American's many advertisements were in compliance with the terms of the Consent Order. It was not until August of 1975 that American received official notification that what the FTC had previously approved was now in violation. American promptly sought resolution in the court below (American Cplt. ¶ 1:27-50, App. at A113-120).

The government's argument with respect to public interest is disingenuous. If the FTC had public interest in

mind it would not have conditioned discussions concerning future compliance with the Order on payment by American of upwards of $1,000,000, nor would it have waited for three years to officially determine that American's advertising was violative of the Order.

(b) The Action Is Meritorious.

American's is not a frivolous lawsuit. Rather American submits it is the unique situation of the same advertising activity being three times accepted by the FTC and now, after three years, being rejected, that calls aloud for judicial interposition.

The government's attempt to skirt the real issue of public interest is understandable, for there can be no doubt that the warning here involved has been so widely publicized and read as to have become judicially noticeable as embedded in the public mind. By statute, the warning statement appears on all cartons and packages of cigarettes sold in the United States, 15 U.S.C. § 1333. Coupled with the insignificant variations and omissions in type size of which the government complains, this public awareness refutes any contentions that the public interest should play a role in determining American's right to a stay and clearly distinguishes those prior cases in which the public interest has constituted a legitimate and crucial concern. (See *Yakus* v. *United States,* 321 U.S. 414 (1944); *Hecht Co.* v. *Bowles,* 321 U.S. 321 (1944); *Floersheim* v. *Weinberger,* 346 F. Supp. 950 (D.D.C. 1972), *rev'd and remanded sub nom., Floersheim* v. *Engman,* 494 F.2d 949 (D.C. Cir. 1973).)

When the real issues of this case are confronted, American's compliance with the traditional preliminary injunction standard is apparent. The facts and circumstances surrounding this case belie the government's incredible contention that, in balancing the public interest in main-

taining the deterrent system in § 45 and in preventing "spurious delays" on one hand, against American's exposure to potentially ruinous penalties on the other, American has failed to show that the balance of the equities tips in its favor. It has clearly been the government which has delayed in this matter and attempted to use the deterrent system in 15 U.S.C. § 45 to blackmail American into paying substantial penalties.

POINT III

Issues Involving The Merits Of This Matter And The Pending Motion In The Court Below Are Not Properly Before This Court.

The government would argue that in order to obtain the stay American sought below, it was required to, and failed to, meet the conventional burden for obtaining a preliminary injunction. Assuming *arguendo* that the government's position is correct, that issue is not properly before this Court. As the government is well aware, the court below would not entertain argument on the issues involved. When counsel for American attempted to get into the underlying facts, the court stated "I can't get into the issues, as enjoyable as that might be" (A260). In fact, the government's counsel objected to any argument involving the merits of the case (A261) and the court, in its written opinion, did not find it necessary to reach this issue (A297). Nevertheless, if this Court should decide to adopt the government's argument, the record is clear that there are involved sufficiently serious questions going to the merits to make them fair grounds for litigation and the record demonstrates probable success by American on these questions. As Judge Leventhal explained in the recent decision of *Ford Motor Co.* v. *Coleman,* 75 Civ. 1340 (D.D.C. September 22, 1975), "probable success on the merits . . . means only . . . that the evidence is (probably) in equi-

poise. By 'evidence in equipoise' we mean that on some item that it is material for the Government to establish, as the party with the burden of proof, the court cannot fairly say whether the item or its contrary is the more probable." Slip op. at 14. American's Verified Complaint clearly satisfies this requirement (A104-166).

Likewise the government seeks to interject matter which is presently the subject of a pending motion in the court below at pages 3, 21-22 of its brief. As plaintiffs have detailed in their brief to the court below, plaintiffs are entitled to pre-enforcement judicial review of the FTC's determinations* and the legislative history does not evidence any Congressional intent to preclude such review. It is respectfully urged that this Court not consider these issues *de novo,* but rather await the district court's determination on the pending motion.

Likewise, if this Court determines that the issue of serious questions going to the merits or probability of success should be decided, it is respectfully urged that, because this issue was not decided in the court below, this Court should remand the matter for a hearing in the district court. See, e.g., *Glen Mfg. Inc.* v. *Perfect Fit Industries, Inc.,* 420 F.2d 319, 321 (2d Cir.) *cert. denied,* 397 U.S. 1042 (1970); *Wolff* v. *Selective Service Local Board No. 16,* 372 F.2d 817, 826 (2d Cir. 1967).

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* See, *e.g., National Automatic Laundry & Cleaners Council* v. *Shultz,* 443 F.2d 689 (D.C. Cir. 1971); *Potomac Federal Corp.* v. *SEC,* [1974-75 Transfer Binder] Fed. Sec. L. Rep. ¶ 94,704 (D.D.C. 1974); *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967).

Conclusion

American respectfully submits that the order of the District Court denying appellants' motions for a stay of the accumulation of penalties pending final judgment should be reversed and the matter remanded to the District Court with instructions to grant the requested relief.

Respectfully submitted,

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Of Counsel

ADDENDUM A

AMERICAN BRANDS, INC.
245 Park Avenue, New York, New York 10017

OFFICE OF THE
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL

September 5, 1975

Hon. Lewis A. Engman, Chairman
Federal Trade Commission
Federal Trade Commission Building
Pennsylvania Avenue at 6th Street, N.W.
Washington, D.C. 20580

Re: American Brands, Inc.
Docket No. C-2182

Dear Mr. Chairman:

This is in response to the official communication dated August 1, 1975 from Mr. Tobin, Secretary of the Commission, to American Brands, Inc. with respect to compliance with the Consent Order in Docket No. C-2182.

With respect to the matters the Commission is holding in abeyance for 180 days, American's representatives are ready to meet with the Commission's representatives at the earliest mutually convenient time.

At a hearing held on August 25, 1975 before the Hon. Charles Tenney, United States District Judge for the Southern District of New York, your counsel (at pp. 45-46) stated to the Court that the August 1, 1975 letter was intended by the Commission to give the cigarette manufacturers an opportunity to come forward with a reasonable

settlement proposal. Your letter was by its plain language an official determination of violation and decision to litigate and could not have been understood to be otherwise. However, in the interests of facilitating a resolution of the matter, American accepts the representation of your counsel as to its purpose and intent. Particularly in light of the varying interpretations that have been placed on your letter American would like to be on the record as stating its disagreement with the determination that it has violated the Consent Order.

As I believe you know, and insofar as American is concerned, there have been no prior discussions with respect to settlement of any of the matters raised in the August 1 letter. Again, insofar as American is concerned, this has been (i) because of the insistence of some members of your staff that before discussing compliance, American and the other cigarette manufacturers would have to put a "huge" amount of money on the table and (ii) because of the inability to obtain specifications of American's advertisements which your staff believed were not in compliance with the Consent Order to enable American to make modifications in its future advertising.

At the hearing before Judge Tenney, your counsel represented to the Court that placing huge amounts of money on the table was not a pre-condition to settlement discussions as American had been told. By way of illustrating the Commission's flexibility (and without indicating what, if anything, the Commission intended to do) your counsel further stated before Judge Tenney that the Commission had not forwarded to the Department of Justice any notice of its intentions to litigate this matter and, further, that you might not seek any monetary penalties if a civil action were to be instituted. I presume that the position taken in court will carry through into any settlement negotiations. As an overall matter the positions taken by your counsel in court were considerably less strident than those

theretofore taken by your staff. At the conclusion of the hearing, Judge Tenney suggested that the parties attempt to resolve matters on an amicable basis.

In view of the representations made by your counsel in court on August 25 and pursuant to the suggestions of Judge Tenney, American's representatives are ready to meet with your representatives in an attempt to resolve all of the matters in your August 1 letter. If you are amenable to discussions on the basis outlined by your counsel, please have your representative call me or Mr. Arnold Henson at (212) 557-5050 to fix an early meeting date.

Furthermore, if the Commission believes that the provisions of the Consent Order are inadequate or inappropriate, American is willing to negotiate changes and modifications so long as any such changes or modifications are made generally applicable. As you know, American believes that the present staff and the present Commission are changing the "rules" established by a prior staff and a prior Commission. This problem and the multitude of negative ramifications, both for you and for us, can easily be remedied by negotiating changes in the Consent Order to make it more precise and to resolve any ambiguities. This course would be more expeditious than litigation and would be much more likely to provide practical solutions.

This letter is written in an attempt to resolve matters between American and the Commission. It is not an admission of any violation of the subject Consent Order and it is not intended that it will be used against American in present or future proceedings.

Very truly yours,

CYRIL F. HETSKO
Cyril F. Hetsko
Senior Vice President
and General Counsel

cc: Hon. Paul Rand Dixon
Hon. Mayo J. Thompson
Hon. M. Elizabeth Hanford
Hon. Stephen Nye

Hon. Charles A. Tobin, Secretary
Federal Trade Commission

Hon. Edward H. Levi
Attorney General of the United States

Paul J. Curran, Esq.
United States Attorney for
the Southern District of New York
Att: Richard J. Weisberg, Esq.

William Cerillo, Esq.
Office of the General Counsel
Federal Trade Commission

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

Mr. Cyril F. Hetsko
Senior Vice President
and General Counsel
American Brands, Inc.
245 Park Avenue
New York, New York 10017

SEP 24 1975

Re: American Brands, Inc.
Docket No. C-2182

Dear Mr. Hetsko:

This is in response to your letter of September 5, 1975 to Chairman Engman. As you know, on September 10 the Chairman met with representatives of the cigarette companies at their request to discuss the matters which you have raised.

As Chairman Engman stated at that meeting, the purpose of the August 1, 1975 letter was to inform the companies of the Commission's determination that each has violated the 1971 consent order and that the Commission would notify the Attorney General, pursuant to the requirements of the Federal Trade Commission Act (15 USC 56), that it intends to file complaints seeking monetary penalties and other appropriate relief. The Attorney General was so notified on August 29, 1975.

However, the Chairman stated that as in all matters involving litigation, the opportunity for informal resolution is always open. To that end, the Bureau of Consumer Protection staff met with your representative on September 19.

Sincerely,

J. THOMAS ROSCH
J. Thomas Rosch,
Director

ADDENDUM B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff v. AMERICAN BRANDS, INC., a corporation, Defendant.	CIVIL ACTION No.

COMPLAINT

The United States of America, acting upon the notification to the Attorney General by the Federal Trade Commission (hereinafter, "the Commission"), brings this action under Sections 5(l) and 16(a)(1) of the Federal Trade Commission Act [15 U.S.C. §§ 45(l) and 56(a)(1), *as amended,* Pub. L. No. 93-153, § 408(c) (Nov. 16, 1973) and Pub. L. No. 93-637 § 204(a)(1) (Jan. 4, 1975)], to recover civil penalties for violations of a final order to cease and desist issued by the Commission, and to secure injunctive relief, and alleges:

JURISDICTION AND VENUE

1. Subject matter jurisdiction is predicated upon 28 U.S.C. §§ 1331(a), 1337, 1345 and 1355.

2. Venue in the District of Columbia is based upon 28 U.S.C. §§ 1391(b-c) and 1395(a).

DEFENDANT

3. Defendant American Brands, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, and has its office and principal place of business at 245 Park Avenue, New York, New York 10017.

4. At all times material herein, defendant has been engaged in the advertising, offering for sale, sale, or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PRIOR COMMISSION PROCEEDINGS

5. A Federal Trade Commission proceeding bearing Docket No. C-2182 in which defendant American Brands, Inc., was charged with violating Section 5(a) of the Federal Trade Commission Act [15 U.S.C. § 45(a)], terminated with the issuance by the Commission on March 30, 1972, of an order to cease and desist certain deceptive practices. This order was served upon the defendant American Brands, Inc., on April 7, 1972, and become final by operation of law 60 days thereafter.

6. A copy of the Commission's complaint and order, as well as proof of service upon defendant, is attached hereto as Exhibit A. Included in the Commission's order is the following language:

ORDER

I.

"IT IS ORDERED that respondent American Brands, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with

the offering for sale, sale or distribution of cigarettes in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising any such cigarette unless respondent makes in all advertisements of such cigarette a clear and conspicuous disclosure of the statement prescribed in Section 4 of the Public Health Cigarette Smoking Act of 1969 (Public Law 91-222) which reads:

'Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.'

A. For the purposes of this Order, the term "cigarette" shall mean (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labelling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

B. For the purposes of this Order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other periodicals published and distributed in the United States and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, and advertisements appearing on billboards placed or located within the United States and in other materials as specified in Sections D, E, and F.

C. For the purposes of this Order, the term "clear and conspicuous disclosure" shall mean that:

1. The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

2. The warning statement shall be set in two horizontal lines parallel with the base of the advertisement, separated by leading equivalent to the lower case "x-height", excluding the ascending and descending letters, of the particular type size. In any case where the width of an advertisement in any printed medium is too narrow because of the columnar format, the warning statement may appear in three lines provided there is full compliance with all other requirements in this definition.

3. The warning statement in newspaper, magazine, and other periodical advertisements shall appear in Univers 47 (Fdy) type style. The type size to be employed shall be the following:

10-point type.....in newspaper, magazine, and other periodical advertisements of a trim size not larger than 180 square inches.

12-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 65 square inches but not larger than 110 square inches.

14-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 110 square inches but not larger than 180 square inches.

16-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches.

A double full-page or a multiple full-page advertisement in any non-tabloid newspaper shall contain

a separate warning statement in 16-point type on each page. A double full-page or multiple full-page advertisement in any tabloid newspaper, magazine or other periodical shall not be required to contain more than one warning statement but the type size requirement shall be determined by the total aggregated size of the entire advertisement. An advertisement which occupies one full-page and part of another page in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on the full page on which the advertisement appears. An advertisement which occupies part of each of two or more pages in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on that page which contains the greater (or greatest) part of the advertisement.

4. Every warning statement shall be set in a ruled rectangle. The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be

14-points away from the type block. The width of the rule enclosing the rectangle shall be ¼ point where 10-point type is used in the warning statement; ½-point where 12-point type is used in the warning statement; ¾-point where 14-point type is used in the warning statement; and 1-point where 16-point type is used in the warning statement.

5. The warning statement shall be printed in black against a solid white background within the rectangle, and the enclosing rule shall be printed in black.

6. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration or text within the advertisement. The warning statement in its rectangle shall not be contained or included as an integral part of any specific pictorial design or illustration; in particular, it shall not be made a constituent part of a reproduction of the package of cigarettes. The warning statement in its rectangle may be printed or superimposed upon any pictorial background portion of any advertisement.

7. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement, may be positioned anywhere within the trim area of the advertisement, but shall not be positioned in the margin of any advertisement. The rectangle shall not be positioned immediately next to, or immediately contiguous to, any rectangular designs, elements, or similar geometric forms (other than a picture of the cigarette package) or immediately contiguous to any textual matter appearing in the advertisement.

8. Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondent shall not be in violation of this Order.

D. On billboards of a size 24-sheets and larger, the type size of the warning statement shall be not less than 2 inches in height, and the rectangle and the enclosing rule shall be of a size, shape, contrast, and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On billboards of a size 6-, 7-, and 8-sheets the type size shall be not less than ¾ inches, on those of a size 2- through 5-sheets the type size shall be not less than ½ inch, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On 1-sheet billboards the type size shall be not less than 24-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On all public transit side cards of any shape the type size shall be not less than 18-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. All public transit end cards shall comply with the minimum requirements for 1-sheet billboards. The type style on

any billboard or transit card shall be Univers 47 (Fdy) or a similar font.

E. On all point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, the warning statement within its rectangle shall be included in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6 and -7. In determining the size of the advertising display area in point-of-sale promotional materials consisting of two or more pages, the total advertising display area of each page on which any printed or graphic material appears shall be aggregated, and where the aggregate of the advertising display area, on which any printed or graphic material appears, exceeds 36 square inches, the warning statement within its rectangle shall be placed on one of those pages and proportionalized to the size of that page in accordance with Section C. The warning statement shall not be required on any non-media advertising and promotional materials offered or given to consumers; nor shall the warning statement be required on any promotional materials which are not for public display or public consumer exposure, and are distributed to cigarette wholesalers, dealers, and merchants.

F. All advertising contained in non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs shall contain the warning statement within its rectangle in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7.

G. Sections C, D, E, and F of this Order shall become effective sixty (60) days after it is finally issued, but to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, the requirements of Sections C, D, E, and F shall not be applicable (a) to newspaper, magazine, or other periodical advertising for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type to the production house, is less than forty-five (45) days after the date on which this Order shall become effective; (b) to advertising appearing on billboards for which copy must, according to the earliest practical date for replacement, be delivered in final form to the printer or painted or assembled on such billboards less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising appearing on billboards Sections C, D, E, and F shall become applicable one-hundred eighty (180) days from the date this Order shall become effective; (c) to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs which is delivered in final form to the printer less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs, Sections C, D, E, and F shall become applicable one-hundred forty (140) days from the date this Order shall become effective; or (d) to point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36

square inches, delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective.

H. This Order shall not be applicable to signs on factories, plants, warehouses, and other facilities related to the manufacture or factory storage of cigarettes, to corporate or financial reports, or to employment advertising, or to advertising in tobacco trade publications not circulated to consumers.

7. Plaintiff realleges and incorporates by reference in each of the counts set out below all of the allegations contained in paragraphs 1 through 6 of this Complaint.

COUNT ONE

[Failure to Disclose Any Health Warning]

8. From about July 15, 1972, and continually thereafter, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, defendant failed to disclose the health warning required by Part I of the Commission's Order in advertisements of such cigarettes which since July 15, 1972, it has disseminated or caused to be disseminated on numerous media point-of-sale and other promotional materials exhibited to purchasers, which have a surface containing an advertising display area of more than 36 square inches, thereby violating Sections E or F of Part I of the Order. Included among such violations for example are:

A) Vending machine panels such as those appearing on vending machines manufactured or distributed from July 15, 1972, to present by:

NATIONAL VENDORS DIVISION OF U.M.C., INC.
5055 Natural Bridge
Saint Louis, Missouri

FAWN SALES DIVISION OF IVA, INC.
An Iowa Corporation

ROWE INTERNATIONAL, INC.
75 Troy Hills
Whippany, New Jersey

LEISURE-MATHICS
2350 Robins Lane
Syosset, New York

B) Shopping bags, including for example the Super M plastic bag.

C) Store signs and counter racks.

COUNT TWO

[Failure to Make a Clear and Conspicuous Disclosure Because the Health Warning Appears Too Small or is Improperly Placed]

9. From about July 15, 1972, and continually thereafter in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, defendant failed to disclose clearly and conspicuously in advertisements of such cigarettes the health warning required by Part I of the Commisson's Order in that

1. the health warning was disclosed to the public

a) in run of paper (ROP) newspaper advertisements in a type style different from that required, thereby violating Part I, Sections C-3 or E of the Order. Included among such violations for example is the Twist cigarette advertisement appearing in the *Journal Herald*, Dayton, Ohio, December 27, 1973.

b) in run of paper (ROP) newspaper advertisements and on counter racks and store signs in a type size smaller than that required for the advertisement's trim size or for its advertising display area, thereby violating Part I, Sections C-3 or E of the Order. Included among such violations in newspapers, for example, is the Twist cigarette advertisement appearing in the *Journal Herald,* Dayton, Ohio on December 27, 1973.

COUNT THREE

[Failure in Foreign Language Advertisements to Make a Clear and Conspicuous Disclosure of the Health Warning]

10. From about November 13, 1973, and continually thereafter, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, defendant failed to disclose clearly and conspicuously in advertisements of such cigarettes the health warning required by Sections C-1, D and E of Park I of the Commission's Order in that

1. the health warning was disclosed in a language different from that principally used in the advertisement. Included among such violations for example is the cigarette advertisement for Pall Mall Gold 100's appearing in *Avante Magazine,* March 4, 1974.

2. the health warning was disclosed in language different from that prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969. Included among such violations for example is the cigarette advertisement for Tareyton cigarettes appearing in *Vea Magazine,* May 4, 1974.

11. Each copy of every advertisement for cigarettes which defendant has caused to be published or otherwise

exhibited to consumers since the dates specified in the above counts and which has failed to conform to one or more of the specifications stated in the above counts constitues a separate violation of the Commission's Order.

12. Due to defendant's consistent failure to comply with the terms of the Commission's Order, its cigarette advertisements have either omitted the health warning or have disclosed it in an unclear and inconspicuous manner, thereby denying the public proper notice of the dangers to health determined by the Surgeon General to be inherent in cigarette smoking.

REMEDY AT LAW INADEQUATE

13. Defendant's violations are many and widespread, and have prevented consumers from receiving the warning required by the Order. Monetary penalties alone will be inadequate to deter defendant from future violations and will not redress the past failures to disclose the health warning.

PRAYER

WHEREFORE, plaintiff demands judgment against defendant for each and every violation charged in this Complaint and requests that the Court as provided by law (15 U.S.C. § 45(l)):

1. Award plaintiff monetary civil penalties from defendant American Brands, Inc.

2. Require defendant American Brands, Inc., to create in an amount to be determined by this Court a trust fund to be used for the preparation and dissemination of such broadcast, print or other advertisements as will be chosen and published by a master to be appointed by this Court and as will be ac-

ceptable to the Commission for the purpose of remedying defendant's failures to disclose a clear and conspicuous warning of the dangers to health that the Surgeon General has determined exist with cigarette smoking.

3. Enjoin permanently the defendant American Brands, Inc., from further violations of the Commission's Order, and award plaintiff the costs of bringing this action as well as such other and additional relief as may be proper and just.

.....
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